89-08

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILBURN GONCE and LARRY RILEY,
Petitioners

v.

VETERANS ADMINISTRATION,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

I. What are the limits, if any, of an arbitrator's discretion in interpreting a collective bargaining agreement? What, if anything, constitutes "plain language" in a collective bargaining agreement such that an arbitrator cannot ignore such language?

II. Will the doctrine of "collateral estoppel" be applied to give preclusive effect to "interpretations" of prior arbitrators when the "interpretations" are clearly inconsistent with subsequent "interpretations"?

III. Whether the record below was sufficient to determine whether or not the application of collateral estoppel was justified in the instant cases such that prior arbitration awards would preclude subsequent inconsistent awards.

IV. Whether the arbitration awards in Petitioners' cases were arbitrary, capricious, or unsupported by the evidence.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

NO. 88-3328,-3329

WILBURN GONCE and LARRY RILEY,
Petitioner

v.

VETERANS ADMINISTRATION
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Wilburn Gonce and Larry Riley, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this matter on April 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, whose judgment is herein sought to be reviewed,

is unreported and is reprinted in the separate Appendix to this petition, page 1. The prior opinions of the Arbitrators are also reprinted in the Appendix, pages 21 and 38 respectively.

## JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 13, 1989. A copy of the Court's Order is reprinted in the Appendix to this petition, page 1. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 2154(1).

## QUESTIONS PRESENTED

I. What are the limits, if any, of an arbitrator's discretion in interpreting a collective bargaining agreement? What, if anything, constitutes "plain language" in a collective bargaining agreement such that an arbitrator cannot ignore such language?

II. Will the doctrine of "collateral estoppel" be applied to give preclusive

effect to "interpretations" of prior arbitrators when the "interpretations" are clearly inconsistent with subsequent "interpretations"?

III. Whether the record below was sufficient to determine whether or not the application of collateral estoppel was justified in the instant cases such that prior arbitration awards would preclude subsequent inconsistent awards.

IV. Whether the arbitration awards in Petitioners' cases were arbitrary, capricious, or unsupported by the evidence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 5 U.S.C.A. Sections 7703(a)(1) and 7703(c) which provide as follows:

"(a) (1) Any employee ...adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the

order or decision."

"(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;"

This case also involves 5 U.S.C.S. Section 7121(f) which provides as follows:

"In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall

apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board."

## STATEMENT OF THE CASE

This is a consolidated appeal from arbitration proceedings dismissing the grievances of Wilburn Gonce and Larry Riley as not arbitrable.

### A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Gonce and Riley were employed as members of the nursing staff of a locked psychiatric ward at the Veterans Administration Medical Center, Waco, Texas. In April and May of 1986, the Veterans Administration issued letters of proposed removal to approximately nineteen employees assigned to the nursing staff, primarily nursing assistants, on the locked ward. All affected employees were represented by A.F.G.E., Local 1822 and grieved the

proposed removals in May and June of 1986. Final decisions removing eleven of the employees were issued by the Agency on or before July 11, 1986. Pursuant to Article 14, Section 1, of the Master Agreement between the Veterans Administration and the American Federation of Government Employees (App-94), A.F.G.E.. Local 1822 referred all cases involving removal to regular arbitration. Notice to invoke arbitration in each case was timely made.

All proposed disciplinary action was based solely on time-lapsed videotapes, copies of which were not furnished to the Union representatives and affected employees, but the representatives and employees were allowed to view the tapes during the grievance process.

Beginning in September of 1986, the Union assisted affected employees in proceedings before the Texas Employment Commission seeking to recover unemployment

compensation. During the hearings before an appeals referee of the Commission, Union representatives and employees discovered that the Agency had videotapes which were significantly different from those previously viewed by the Union and the employees. When the Agency refused to make copies of the videotapes for the affected employees or for the Texas Employment Commission, A.F.G.E. Local 1822 filed a unfair labor practice complaint with the Federal Labor Relations Authority seeking to obtain copies of the original videotaped evidence maintained by the Agency.

In December 1986, the Regional Director of the FLRA determined, inter alia, that the charge of the Union was untimely filed. The Regional Director's decision was appealed in January of 1987, and affirmed in or about March of 1987.

On or about March 31, 1987, a new director was appointed to the VA Medical

Center in Waco, Texas. The director and the Union entered into settlement negotiations relative to all pending remoal cases. When settlement negotiations were unsuccessful, the Agency and the Union proceeded to arbitration on a case-by-case basis. The first employee to proceed to arbitration under the conventional arbitration procedures of the Master Agreement (Article 14, Section 2, App-94) was Jeanie Anderson. A list of arbitrators for her case was requested and furnished in May of 1987. Although the Master Agreement required the parties to select an arbitrator within ten (10) calendar days after receipt of such list, the parties, by agreement, extended the time limit on selection of the arbitrator until August of 1987, again attempting settlement. On September 11, 1987, the Agency informed the Union that it intended to raise the issue of "arbitrability" in the Anderson case,

claiming that the request for a list of arbitrators was untimely submitted.

On October 1, 1987, the case of Jeanie Anderson proceeded to arbitration, with the arbitrator being asked to decide both (1) the issue of arbitrability and (2) the merits of the case. On October 31, 1987, the arbitrator rendered a decision finding both issues in favor of the employee and reinstating the employee with full restitution. (App-46).

For a brief period of time thereafter, the Agency and the Union reattempted settlement of the remaining cases. When unsuccessful, and when the Agency advised the Union that it would again raise the issue of arbitrability, the Union requested a list of arbitrators for all remaining cases. On December 21, 1987, the Agency joined with the Union in requesting lists for each case.

The cases proceeded to arbitration on a

case-by-case basis. Lists of arbitrators were timely furnished; arbitrators were timely selected; and arbitration dates were set by the arbitrators as follows:

1. In re: Clovis Sutton, FMCS #86-00612, March 22, 1988.
2. In re: Melvin L. Gayle, FMCS #88-06827, March 28, 1988.
3. In re: Ernest B. Cashaw, FMCS #88-06827, April 14, 1988.
4. In re: Rudy Morales, FMCS #88-06607, April 19, 1988.
5. In re: Ted Basley, FMCS #88-06609, April 27, 1988.
6. In re: Wilburn Gonce, FMCS #88-06829, May 2, 1988.
7. In re: Larry Riley, FMCS #88-06824, May 20, 1988.
8. In re: Kirk West, FMCS #88-06611, May 23, 1988.

All cases proceeded to hearing before an arbitrator except the cases of Basley

and Riley. The Basley case was settled. The issue of arbitrability was decided in the Riley case without hearing, on the basis of briefs requested by the arbitrator. All arbitrators, except the arbitrators in the cases of Gonce and Riley, found that the cases were arbitrable. (The decisions of the arbitrators in Gonce and Riley cases are reprinted in the Appendix, pages 21 and 38 respectively.) Petitions for review in the cases of Gonce and Riley were timely filed with the Court of Appeals for the Federal Circuit on June 27, 1988. The cases were consolidated by order of the court on August 30, 1988. The decisions of the arbitrators were affirmed by the Court on April 13, 1989, with Senior Circuit Judge Nichols dissenting. (App-1)..

B. STATEMENT OF THE EVIDENCE.

This Petition for Writ of Certiorari applies to the issue of the arbitrability

of the cases of Petitioners Gonce and Riley and not to the merits of the cases. Therefore, the evidence specifically related to this petition involves (1) the sequencing of events as set forth in the preceding section, which evidence has been undisputed previously, (2) the terms of the Master Agreement, which in relevant part are reprinted in the Appendix beginning at page 94, and (3) the opinions of arbitrators which were rendered prior to the decisions of the arbitrators in the Gonce and Riley cases, i.e. the opinion of Arbitrator Schmedler in the case of Jeanie Anderson, which is reprinted in the Appendix beginning at page 46, the opinion of Arbitrator Woodward in the case of Melvin Gayle, which is reprinted in relevant part in the Appendix beginning at page 74, and the opinion of Arbitrator Harr in the case of Ernest Cashaw, which is reprinted in relevant part in the Appendix

beginning at page 89.

## REASONS FOR GRANTING WRIT

**I. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT DESPITE THE CLEAR AND OBIOUS INCONSISTENCY OF THE INTERPRETATIONS OF THE COLLECTIVE BARGAINING AGREEMENT, THE COURT NEED NOT GIVE PRECLUSIVE EFFECT TO THE INTERPRETATIONS OF PRIOR ARBITRATORS AND SHOULD INSTEAD ALLOW INCONSISTENT INTERPRETATIONS TO GOVERN EACH INDIVIDUAL CASE.**

In its opinion, the Court of Appeals clearly acknowledges that the differences between the awards of prior arbitrators and the decisions of the Gonce and Riley arbitrators result from inconsistent interpretations of the Collective Bargaining Agreement. Specifically, the Court states:

> "The arbitrators here came to a conclusion about the meaning of the Collective Bargaining Agreement different from those who decided the issue earlier."

However, the Court's opinion goes on to state that the inconsistency "in and of itself is not any reason for us to question it."

In Connecticut Light & Power v. Local 420, International Brotherhood of Electrical Workers, 718 F.2d 14 (2d Cir. - 1983), the court stated that generally speaking it is only fair and reasonable to expect an arbitrator's decision to apply to subsequent cases unless it can be shown that (1) the previous decision was clearly an instance of bad judgment; (2) the decision was made without the benefit of some important and relevant facts or considerations; or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision. While not specifically so stating, it appears that the Court of Appeals determined that the reasoning of the prior arbitrators was "an instance of bad judgment" when compared to that of subsequent arbitrators and thus justifies its decision by stating:

"The Union's resort to other forms

> does not excuse its lack of diligence in these grievances. Simply put, it was the Union's responsibility to request the panel of arbitrators 'on or after the date of the notice of arbitration' so as to secure 'prompt and equitable resolution of grievances,' but it waited 17 months before it did. From all that appears nothing impeded the request. We agree with the arbitrators that there comes a time when the employer had a right to know whether a Union or employee intends seriously to prosecute a formal grievance, and there is no basis to overturn the conclusion that a 17-month delay is a violation of the Collective Bargaining Agreement." (Emphasis added.)

The Court, like the arbitrators, has incorrectly quoted the Collective Bargaining Agreement. The phrase "prompt and equitable settlement of grievances", quoted by the Court, appears in Article 13, Section 1, of the Bargaining Agreement; whereas, the phrase "on or after the date of the notice of arbitration", quoted by the Court, appears in Article 14, Section 2. Article 13 of the Collective Bargaining

Agreement details the "grievance" procedure; whereas, Article 14 details the "arbitration" procedure. The entire text of Article 13, Section 1, a portion of which is quoted by the Court, reads as follows:

> The purpose of this Article (i.e., Article 13) is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for revolving grievances except as provided in Sections 2 and 3. (Emphasis added.)

Article 13, entitled "Grievance Procedure" does contain specific time limitations on each action to be taken throughout the grievance process. Article 13 ends by stating "If a decision is not issued in 45 days or if the grieving party is dissatisfied with the decision, the grieving party may proceed to arbitration in accordance with Article 14." (Emphasis added.) Article 14, Section 2, a portion

of which is quoted by the Court, provides that:

> On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator.

No time limitation is stated in this provision. Further, Article 14 contains no statement of purpose indicating that it is intended to effectuate "prompt and equitable resolution of grievances". The "prompt and equitable resolution" language is, by the terms of the agreement, applicable only to Article 13 and not to Article 14.

Negotiators of the Collective Bargaining Agreement did provide for "expedited arbitration" in Section 3 of Article 14, and in connection with that procedure and that procedure only, the agreement states that "Notwithstanding the

regular arbitration procedures of the agreement (i.e., Section 2), the following expedited arbitration procedure is hereby adopted to provide prompt and efficient handling of specified grievances" (emphasis added). There follows again specific time limits negotiated by the parties for resolution of specific types of grievances (Section 3.C.). The expedited arbitration procedure cannot be applied to grievances other than those specified in Section 3.C. "unless agreed to by the grievant."

In summary, the Court of Appeals has admitted that the decisions of the arbitrators in Gonce and Riley were inconsistent with the prior arbitration decisions; however, the Court has incorrectly held that under the circumstances the prior arbitration decisions should not be given preclusive effect over subsequent decisions.

II. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE COLLECTIVE BARGAINING AGREEMENT DID NOT REQUIRE THAT THE ARBITRATORS BE BOUND IN ANY WAY BY EARLIER AWARDS.

Article 14, Section 2.G. provides that:

> An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level under procedures set forth below.

While this statement does not include the magic words "collateral estoppel", the provision clearly acknowledges that an arbitrator's award would be applied locally to govern the provisions of contract, even though the parties did mutually agree that an award would not have a binding effect on the national level unless the procedures spelled out in the agreement were followed.

III. THE COURT OF APPEALS ERRED IN FAILING TO LIMIT AN ARBITRATOR'S DESCRETION IN "INTERPRETING" A COLLECTIVE BARGAINING AGREEMENT PARTICULARLY WHEN THE "INTERPRETATION" OF THE AGREEMENT IGNORES THE PLAIN LANGUAGE OF THE AGREEMENT.

Although the court's have given to arbitrators wide latitude in interpreting and applying collective bargaining agreements, an arbitrator's discretion is no completely unbridled. As this Honorable Court has recently stated:

> "The arbitrator may not ignore the plain language of the contract." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, at ___, 108 S. Ct. 364, at 371 (1987).

Both the omission and the inclusion of language may constitute "plain language" and the ommission of a contractual provision is just as significant as the inclusion of an express contractual agreement. An elementary principle of contract construction is that where a contract is silent as to a particular matter, an agreement in reference thereto cannot be interpolated. Phoenix Oil Company v. Mid-Continent Petroluem

Corporation, 177 Ok. 530, 60 P.2d 1054, 111 ALR 504. While it might arguably be acceptable for an arbitrator or a court to invoke the doctrine of "laches" (a defensive matter to be proved by the Agency, rather than the Union in this case), the arbitrators and the Court of Appeals are unjustified in rewriting the contract under the guise of "interpretation". The contract is not ambiguous as to whether or not a time limit was intended, it is simply silent with respect to any time limitation following the notice to invoke arbitration. It is clear that the parties contemplated time limits in other sections of the agreement; thus, the omission of such a limitation in this section is even more significant.

Another provision of the contract buttresses the Union's position that no specific time limitation can be imposed on

a grievant under this particular collective bargaining agreement without violating the express language of the agreement. Article 13, Section 4, of the agreement states that:

> The Agency must assert any claim of . . . non-arbitrability no later than the Step 3 decision. (emphasis added)

Step 3 is the last step in the Article 13 grievance process which precedes the arbitration process set forth in Article 14. Both the arbitrators in Petitioners' cases and the Court of Appeals totally disregarded the plain language of this provision. Perhaps neither of the arbitrators nor the court would have signed a collective bargaining agreement which included such language, but the Veterans Administration did. The grievances of both Petitioners were dismissed as "non-arbitrable"; the issues which formed the bases of these decisions were not

raised until well after Step 3 in the grievance procedure had been completed; and the so-called "interpretations" of the arbitrators simply cannot be reconciled with the plain meaning of the language contained in the contract.

In view of the fact that Article 14, Section 2, contains no specific time limit or statement of purpose relating to the "prompt" resolution of grievances, and in view of the fact that the contract expressly provides that no claim of non-arbitrability should be asserted after completion of the "grievance process" (i.e., Article 13), and in view of the fact that the language of Article 14, Section 2, is clear and unambiguous on its face, without indication that any particular "delay" could constitute a violation of this provision, the Court's majority opinion is erroneous. Instead, the

dissenting opinion correctly states the application of the contract and properly holds that "The arbitrators in the Gonce and Riley cases made an over-imaginative use of the Collective Bargaining Agreement."

The Court of Appeals also ignored another violation of the "plain language" provisions of the collective bargaining agreement when it affirmed the decision of the arbitrator in the Riley case. Article 14, Section 2 B. of the agreement provides that:

> The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. (emphasis added)

The record below is clear that there was no hearing in the Riley case. Although a hearing date had been set for the Riley case and although the issues to be

presented included both the issue of arbitrability and the issue of the merits of the discharge, prior to hearing the Agency blatantly disregarded the provisions of the agreement, urging the arbitrator to deny Mr. Riley his rights to an arbitration hearing, and requesting that the arbitrator proceed to determine the issue of arbitrability based upon a submission of "briefs" by the Agency and the Union. Thereafter the arbitrator ordered the Union to submit a brief in response to the one previously submitted by the Agency; and the arbitrator proceeded to determine the issue of arbitrability without the presentation of evidence or cross-examination. While the agreement does provide that the "procedures used to conduct an arbitration hearing shall be determined by the arbitrator" (Article 14, Section 2.B., cited supra), the agreement also clearly

states in plain and mandatory language that "both parties shall be entitled to call and cross-examine witnesses before the arbitrator." (emphasis added)

IV. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE RECORD WAS INADEQUATE TO ASCERTAIN WHETHER OR NOT THE ISSUE PREVIOUSLY ADJUDICATED WAS IDENTICAL WITH THAT PRESENTED IN THE CASES OF GONCE AND RILEY.

V. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE DOCTRINE OF COLLATERAL ESTOPPEL CANNOT BE APPLIED IN THE INSTANT CASES BECAUSE THE AGENCY CONTENDED IN ARBITRATION PROCEEDINGS THAT THE QUESTIONS OF ARBITRABILITY PRESENTED IN THE GONCE AND RILEY CASES WERE DIFFERENT FROM THOSE PRESENTED IN AND ADDRESSED BY PRIOR ARBITRATORS (SPECIFICALLY IN THE PRIOR ARBITRATION OF THE CASES OF GAYLE AND CASHAW).

VI. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE AWARD IN THE RILEY CASE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

VII. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE AWARD IN THE GONCE AND RILEY CASES WERE NOT ARBITRARY.

Although it might appear that the preclusive effect of prior arbitration awards is always a matter of individual

resolution absent a provision in the governing contract that requires earlier awards to bind subsequent arbitrators, it is permissible to apply collateral estoppel to labor arbitration decision in specified circumstances. See W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 764 (1983), Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222 (1985) but see also Kroeger v. United States Postal Service, 865 F.2d 235 (Fed. Cir. 1988).

In the instant case the Court of Appeals has refused to apply the doctrine of collateral estoppel, holding that the record is:

> "... unclear what the facts are. Though related, the actions taken against the VA employees were based on separate instances of alleged misconduct....there are no transcripts of the arbitration proceedings. Therefore, we cannot tell whether mitigating circumstances distinguish the cases."

The issue presented on appeal was not related to the merits of the termination action but was limited to the issue of whether or not delay in requesting a panel of arbitrators rendered the grievances of petitioners non-arbitrable. Therefore any possible differences in acts of misconduct simply should not be relevant to any issue presented on appeal.

The Veterans Administration, on appeal, has contended that there "might have been" differences in the evidence presented to the two arbitrators. The record from below does not substantiate such a contention. Specifically, in the Riley case, the Agency acknowledged that prior arbitrators (Cashaw and Gayle) had found that 18-month and 17-month delays were not unreasonable. The Agency did not distinguish the findings on the basis of facts presented to the arbitrators, but instead requested the Riley arbitrator to

disregard the fact findings because "we think their judgments were erroneous." (As noted previously, the Riley case was decided on the basis of briefs submitted in by the Agency and the Union. These briefs appeared of record in the court below.) The Agency did not distinguish the facts in the Riley case from the facts in Cashaw or Gayle; it merely urged the arbitrator to disregard the findings in those cases, submitting that "the reasoning and conclusions" of another arbitrator in a totally unrelated case (involving the and employee at the VA Regional Office in San Diego California) "were superior to the judgments of the arbitrator's cited by the union." The Agency did not and could not distinguish between the facts relating to arbitrability in the Riley case versus the facts relating to arbitrability in the Cashaw case.

The Court of Appeals stated that it

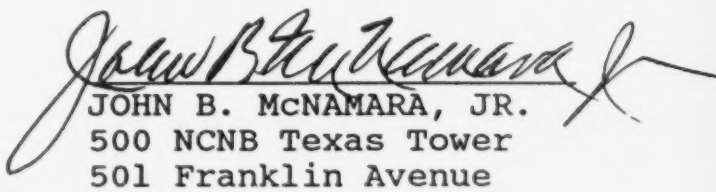
could not determine (1) whether collateral estoppel was justified in the instant cases and (2) whether there was substantial evidence to support the decisions of the arbitrators because there were no transcriptions of any of the arbitration proceedings in the record. The Court of Appeals was furnished with copies of the Briefs and the Statements of Fact incorporated therein that were submitted by both the Agency and the Union in the Gayle, Cashaw, Gonce and Riley cases. The Court of Appeals was also furnished with copies of the opinions of the arbitrators in the Anderson, Gayle, Cashaw, Gonce and Riley cases, which opinions included fact findings related to the issues submitted. There was no hearing in the Riley case; therefore there could be no record in that case other than the documents that were submitted to the arbitrator in written form and furnished to the court. Furthermore,

even though there was no transcription of testimony in the Gonce case, there was a certified list of documents in the Court of Appeals' file and copies of the documents listed therein were contained in Petitioners' Appendix filed with the court. (Petitioners' Appendix was 397 pages in length and is therefore not reprinted in toto in the Appendix to this Petition.) It is most apparent from the Briefs in each of the cases cited above that there were no disputes in the factual issues relating to the events that transpired between the time that arbitration was invoked in the summer of 1986 and the time that a panel of arbitrators was requested by the Union for all remaining grievants in December of 1987. The only difference between the positions of the Agency and the Union with respect to these events was whether or not the events justified the delay in requesting a panel of arbitrators. In

addition, of course, there was a dispute as to whether the contract could be interpreted to allow the Agency to challenge the arbitrability of the grievant's claims despite the delay.

## CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari be granted.



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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari have this 12th day of July been forwarded to all counsel of record.

John B. McNamara, Jr.

89-68

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
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OCTOBER TERM, 1989

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WILBURN GONCE and LARRY RILEY,
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VETERANS ADMINISTRATION,
Respondent

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Filed April 13, 1989

Before: Mayer, Nichols, and Michel,
Circuit Judges

Opinion by Judge Mayer;
Dissent by Judge Nichols

Petition for Review of
Decisions of Arbitrators

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SUMMARY

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CIVIL RIGHTS/COURTS and PROCEDURE/EVIDENCE

This is a consolidated appeal from arbitration proceedings dismissing the grievances of Wilburn Gonce and Larry Riley as not arbitrable. Wilburn Gonce, No. 88-06829 (May 25, 1988) (Goodman, Arb.);

Larry Riley, No. 88-06824 (May 31, 1988) (Hamilton, Arb.). We affirm.

Background

Gonce and Riley were employed as members of the nursing staff of a locked psychiatric ward at the Veterans Administration Medical Center, Waco, Texas. Between April and August 1986, the Veterans Administration (VA) issued letters of proposed removal to nineteen employees on charges that arose from alleged patient abuse captured on videotapes. Eleven employees were subsequently dismissed, including Gonce and Riley.

Gonce and Riley were members of Local Union 1822 of the American Federation of Government Employees (union). As was their right under the collective bargaining agreement established by the union and the VA, they challenged their discharges through the grievance procedure. As the final step in the grievance procedure, the

union invoked arbitration on behalf of Gonce and Riley, among several other employees.

This litigation has a history of skirmishes between the union and the VA in several forums. In addition to the grievances, the union also assisted affected employees in proceedings before the Texas Employment Commission seeking unemployment compensation. During these hearings, a dispute broke out over the quality of the time-lapsed videotapes the VA was using to justify the adverse actions. As a result, the union filed an unfair labor practice complaint with the Federal Labor Relations Authority, which was dimissed as untimely. Finally, during the summer of 1987, the VA and the union engaged in consolidated settlement negotiations. When settlement could not be reached, the union began to request panels of arbitrators to hear the affected

employees' cases.

The issue in this appeal is not whether these employees engaged in patient abuse or any other merit-based issue. It is whether the union volated the collective bargaining agreement by unreasonably delaying a request for a panel of arbitrators after invoking arbitration on behalf of Gonce and Riley, thereby rendering the grievances non-arbitrable. The collective bargaining agreement requires that "[o]n or after the date of the notice to invoke arbitration, the moving party . . . request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator." Master Agreement between the Veterans Administration and the American Federal of Government Employees, Art. 14 < 2 (Aug. 1982) (agreement). The agreement also states that the purpose of the grievance procedure is to provide for the "prompt and

equitable resolution of grievances." Id. at Art. 13 < 1. Gonce was removed by the VA on June 12, 1986, and Riley on June 17, 1986. The union invoked arbitration on behalf of Riley and Gonce on July 9 and 25, 1986, respectively, but did not request a panel of arbitrators in either case until December 21, 1987, seventeen months later.

The union pursued one of the other affected employee's grievances with more vigor. In the case of Jeanie Anderson, the delay in requesting arbitration was nine months. That arbitrator held that the grievance was arbitrable and found for Anderson on the merits. Jeanie Anderson, No. 87-18684 (Oct. 31, 1987) (Schedler, Jr., Arb.). Before the arbitrator in Gonce decided the case, an arbitrator also decided the case of another of Gonce's co-workers, ruling that the grievance was arbitrable despite a seventeen-month delay, and finding for him on the merits. Melvin

Gayle, No. 88-06827 (May 2, 1988) (Woodward, Arb.).* Gonce and Riley argued that these decisions collaterally estop the VA from maintaining that their grievances are non-arbitrable, and that, in any event, the delay was justified.

In contract to the other decisions, the arbitrators in both Gonce and Riley addressed the issue of arbitrability separately from the merits. In reviewing the prior awards, the Riley arbitrator observed that they had not addressed delay in terms of whether it violated the collective bargaining agreement, and that prior arbitrators allowed their view of the merits to cloud their judgment on the arbitrability issue. The Gonce arbitrator found that the case before him was

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* The Riley arbitrator also had before him the award of Earnest Cashaw, No. 88-06610 (May 16, 1988) (Harr, Arb.), in which the grievance was found arbitrable despite an eighteen-month delay. The discussion relating to Gayle is equally pertinent to Cashaw in the Riley case.

factually different from the prior cases. But both arbitrators ruled that they were not bound by prior awards and that the delay was a violation of the collective bargaining agreement. Therefore the grievances were not arbitrable. This appeal followed.

Discussion

Gonce and Riley pursued their complaints under negotiated grievance procedures controled by 5 U.S.C. < 7121 (1982) under which they are entitled to review of their awards here. The standard of review of arbitral decisions is the same as for review of final decisions of the Merit Systems Protection Board. 5 U.S.C. < 7121(f) (1982); Grisby v. United States Dep't of Commerce, 729 F.2d 772, 774 (fed. Cir. 1984). Therefore, the decisions of the arbitrators to deny collateral estoppel effect to the prior awards and to hold the grievances non-arbitrable because of

excessive delay in requesting a panel must be affirmed unless they are arbitrary, capricious, an abuse of discretion, contrary to law or unsupported by substantial evidence. 5 U.S.C. < 7703(c) (1982); Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

From what the Supreme Court has said, it appears that the preclusive effect or prior arbitration awards is for individual resolution, absent a provision in the governing contract that requires earlier awards to bind subsequent arbitrators. See W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 764 (1983); see also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222 (1985); McDonald v. City of West Branch, 466 U.S. 284 (1984). There is no requirement in our collective bargaining agreement that arbitrators be bound in any way by earlier

awards.

We held in Kroeger v. United States Postal Service, 865 F.2d 235 (Fed. Cir. 1988), that it is permissible to apply collateral estoppel to labor arbitration decisions in specified circumstances. In that case, a Postal Service employee was discharged for mishandling postal funds. The employee appealed the dismissal to an arbitrator, who found just cause for Kroeger's removal. Kroeger appealed the dismissal to the Merit Systems Protection Board which affirmed the removal, finding the charge of mishandling funds was fully litigated in the prior arbitration proceeding and subject to collateral estoppel.

We affirmed the Board's decision, stating that "[t]here are and will be cases in which application of collateral estoppel is justified," such as when

> (i) the issue previously adjudicated is identical with that now presented, (ii) that issue was

> "actually litigated" in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action.

865 F.2d at 239 (quoting Thomas v. General Serv. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986)).

The first requirement of the Kroeger test, that the issue previously adjudicated be identical to the one now presented, Kroeger, 865 F.2d at 239; see also Thomas, 794 F.2d at 664; Mother's Restaurant v. Mama's Pizza, Inc., 724 F.2d 1566, 1569 (Fed. Cir. 1983), is problematical here becuase it is unclear what the facts are. Though related, the actions taken against the VA employees were based on separate instances of alleged misconduct. The union presented both arbitrators with a prior award allowing arbitration despite a seventeen-month delay (Gayle), but there are no transcripts of the arbitration

proceedings. Therefore, we cannot tell whether mitigating circumstances distinguish the cases. It was up to Gonce and Riley to provide us with pertinent parts of the administrative record and citations to it in support of their appeals which they did not do. Chaney & James Constr. Co. v. United States, 421 F.2d 728, 740 (Ct. Cl. 1970); see also Milmark Serv. v. United States, 731 F.2d 855, 858 (Fed. Cir. 1984). So we cannot look beyond what the arbitrators said in announcing the awards themselves.

Notwithstanding, we think this case presents a situation different from Kroeger. There was no dispute in Kroeger that the charge of mishandling funds was the same before both the arbitrator and the Board. We simply upheld the Board's decision to give preclusive effect to the findings of the arbitrator who had already heard and decided precisely the same issue

contested by the same parties. Here, the arbitrators agreed with the VA that the questions of arbitrability presented in the Gonce and Riley cases were different from those addressed in the other awards cited. Gonce and Riley want us to overturn the arbitrators' independent interpretations of the collective bargaining agreement, and force them to give preclusive effect to prior awards, even though the facts may have been different and the collective bargaining agreement allows either party to request that grievances be handled individually.

The Supreme Court says courts must enforce the decisions of private arbitrators in interpreting a collective bargaining agreement, and should not review the merits of the awards except to ensure that they are not inconsonant with public law and policy. W. R. Grace & Co., 461 U.S. at 764. The district court in Grace

refused to enforce an award in which the arbitrator concluded that a prior arbitrator in deciding the same contractual arbitrator was not bound by that award. In sustaining the second award, the Court said,

> Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," . . . a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis of the arbitrator's decision may be ambiguous. [Id.]

Concededly Grace addresses judicial enforcement of private arbitration and Gonce and Riley have a statutory right of judicial review, but it is pertinent to the proposition that courts should respect arbitral awards based on the agreements both parties bargained for. 461 U.S. at 765; see also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). The VA exercised the right to request that each grievance be handled

individually, and therefore lack of uniformity among awards is not unexpected or objectionable. Like the second arbitrator in Grace, the arbitrators here came to a conclusion about the meaning of the collective bargaining agreement different from those who decided the issue earlier. But that in and of itself is not any reason for us to question it.

Courts should be careful not to "judicialize" the arbitration process. Arbitration normally envisions that each case be decided on its own under the controlling contract without undue reliance on other arbitration awards, even if the facts and circumstances are close. Arbitrators are expected to bring their best independent judgment to bear, not ritualistically follow what others have done, especially, as here, when they suspect an error was earlier committed. It is one thing to bind the parties by

estoppel when the same facts have already been resolved by an earlier forum of competent authority as in Kroeger; it is quite another to bind them when there is not precise correspondence of facts, circumstances, and timing, as here. Indeed, if the propounded concept were accepted, the earlier arbitrator who said eighteen months of delay is just fine would have defined the meaning of this collective bargaining agreement for the remainder of its term. That would be incongruous in light of strict time limits on earlier steps of the grievance procedure no longer than forty-five days. Agreement, Art. 13, < 11(B).

Alternatively, Gonce and Riley argue that the arbitral awards are not supported

by substantial evidence. In the absence of a specific contractual or statutory requirement, an arbitrator is under no duty to set out specific findings of fact to support an award. See Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 244 n.4 (1962); Enterprise Wheel, 363 U.S. at 598; see also Wissman v. Social Sec. Admin., 848 F.2d 176 (Fed. Cir. 1988). There was no such requirement in this agreement. Both arbitrators' decisions rejecting the prior arbitration awards' finding of arbitrability, however, were thorough and well-reasoned.

In Gonce, the arbitrator analyzed each of the union's claims of mitigating circumstances and rejected them. He found that the videotapes provided to the union were of sufficient quality to prepare a response to the firings. He found that the Texas Employment Commission hearings did not excuse the delay in pursuing the

grievance. Indeed, Gonce did not even have a Commission hearing. And the arbitrator found that no settlement offer was made for a year between July 1986 and June 1987; in any event, settlement discussions do not justify failure to pursue a grievance with diligence. The Riley arbitrator noted that the union offered a number of excuses for the delay in requesting a panel. But he emphasized that at no time did the union "seek an agreement with the [VA] to toll the time for requesting a panel or suggest any orderly agreement to process the various claims."

The arbitrtor in Gonce distinquished the Anderson award, where the delay was only nine months, but was silent about the Gayle award, also before him, where the delay was nearly the same as here, seventeen months. In light of the absence of a record, discussed above, we must assume the arbitrator properly considered

Gayle; he was obliged to do no more. The Riley arbitrator rejected Gayle because it did not address the question of whether the union breached the collective bargaining agreement.

The federal policy favoring arbitration of labor disputes is well established. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, __, 108 S. Ct. 364, 370 (1987). One reason for this is that arbitration is "generally 'faster, cheaper, [and] less formal' than litigation." Wissman, 848 F.2d at 177. That surely was not the case here. Gonce and Riley could have appealed their dismissals to the Board in lieu of the grievance procedure and likely have had a more expeditious review than this. See 5 U.S.C. << 7121(e)(1), 7701(i)(1) (1982); 5 C.F.R. < 1201.22(a) (1988). The lapse of some seventeen months here is a lumbering pace, and runs counter to the expectation

that arbitration will be "faster, cheaper, and less formal" than administrative or judicial litigation.

The union's resort to the other forums does not excuse its lack of diligence in these grievances. Simply put, it was the union's responsibility to request the panel of arbitrators "on or after the date of the notice of arbitration" so as to secure "prompt and equitable resolution of grievances," but it waited seventeen months before it did. From all that appears nothing impeded the request. We agree with the arbitrators that there comes a time when the employer has a right to know whether a union or employee intends seriously to prosecute a formal grievance, and there is no basis to overturn the conclusion that a seventeen-month delay is a violation of the collective bargaining agreement.

## Conclusion

Accordingly, the awards of the arbitrators are affirmed.

**AFFIRMED**

In the Matter of an Arbitration between

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Veterans Administration Medical Center, Waco, Texas

- and -

Local 1822 AFGE

Opinion and Award

Case Number: FMCS 88-06829

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## THE ISSUE

1. Arbitrability. Was the grievance timely filed?

2. Merits. Did the discipline imposed on the Grievant constitute a procedural breach of contract?

3. Was there just cause to discipline the Grievant?

## ISSUE 1 ARBITRABILITY

### EMPLOYER POSITION

Clearly the matter is not arbitrable. The Labor Agreement provides for a prompt resolution of grievances. A 17 month delay occurred between the time the Union invoked arbitration and the time it requested a

list of arbitrators. The 17 month delay was unreasonable. The Union claims the Employer is the moving party since it has the burden of proof of the merits of the misconduct charges. The Employer acknowledged it has the burden of proof but that does not make it the moving party. There was no need for the Employer to request a panel of arbitrators. The party invoking arbitration is the moving party with respect to arbitration. After the Union announced its intent to proceed to arbitration, the Employer joined, as is customary, in a request for a panel of arbitrators.

The delay in requesting a panel of arbitrators was solely the responsibility of the Union. There were no legitimate mitigating circumstances for the delay. Between July 25, 1986 and May 1987 the Union did not approach the Employer with any settlement proposals or initiate any

settlement discussions. That lapse of nine months was an unreasonable delay. There is conflicting testimony in regard to the events after May 1987. The convincing testimony is that the Employer made one settlement offer in the summer of 1987. The Union responded with a counter offer also during the summer of 1987. No further discussion ensued until December 1987 shortly before the Union announced it wanted a list of arbitrators.

The Union states that part of the delay was because of hearings before the Texas Employment Commission. Although five employees had such hearings, the Grievant was not one of them thus that is not a valid defense for failing to timely proceed to arbitration.

The Union also states that the video tape was a factor in the delay of proceeding to arbitration. Although the original tapes were not made available to

the Union composit tapes were made available. Access to the tapes was never denied when the Union made requests during the normal business hours. The Union also raised the matter of the quality of the tapes. The tapes were of sufficient quality to allow the Grievant to defend himself. This is demonstrated by the fact that the Grievant used them to prepare a detailed written response in appealing his removal from VA service.

The matter of an Unfair Labor Practice charge was also raised by the Union in supporting its delay in proceeding to arbitration. On December 30, 1986 the FLRA refused to issue a complaint for not proceeding to arbitration.

The Union also states that the unusual number of cases was a factor in the delay. Only three cases from Ward 11-B have had any type of hearing. The Union could have proceeded to arbitration for the Grievant

as it did for Davis in October 1986 and Anderson in October 1987.

The Employer had every reason to believe that the Union had abandoned the case.

The Union delay has jeopardized the Employer's right to respond to the grievance. Former Director Noll and Chief of Nursng Service Haynie are not now able to testify.

In support of its position the Union cites the Anderson case and a San Diego case. Neither is binding on the Arbitrator. In the Anderson case the Employer argued only laches. Here the Employer, as in the San Diego case, argued that the 17 month delay violated the Agreement. In such cases prejudice to the Employer need not be shown.

If the 17 month delay is found to be permissable, a bad precedent will have been established.

In the past the Union has recognized that it has a duty to request a panel of arbitrators within a reasonable period of time. During 1984 and 1985 panels of arbitrators were requested within matter of a month or two thus demonstrating the necessity of promptly acting.

The failure to promptly proceed to arbitration raises the matter of laches. (See Brundage c. U.S., 504 F2d 1382 and Gersten v. U.S., F2d 850) as well as Wooten v. U.S. Government Printing Office, Docket No. DC07528210015). In Wooten the MSPB held that a 12 month delay in requesting enforcement of a prior Board order was unreasonable. In Department of Defense (Navy), Jacksonville, Fl and NAGE, LAIRS 17206, 86 FLRR 2-1086, the arbitrtor applied laches for a delay of five and one-half months although the Contract was silent as to specified time period for filing and pursuing arbitration. In VA

Regional Office, San Diego and AFGE Local 490, FMCS 87-23622, the arbitrator held that a delay of eight months was excessive.

Should the Grievant prevail on the merits it would mean 17 months of back liability for the Employer although the Employer was not responsible in any way for the delay in proceeding to arbitration. That is an unfair burden placed on the employer - to allow an employee to vacation for 17 months at the Employer's expense.

The integrity of the Agreement and workability of the arbitration process should be preserved and the grievance should be dismissed as untimely pursued.

**UNION POSITION**

The San Diego Case (FMCS 87-23622) has no applicability here. Article 14 Section 2G specifically states that an award shall have only local application unless it was a national level grievance. FMCS case 87-23622 was not a national level

grievance.

The Employer is precluded from raising the issue of timeliness by Article 13 Section 4 which states that any claim for non-arbitrability must be raised no later than the step 3 decision. It did not do so.

In arbitration the party having the burden of proof is the moving party. Section 2 Article 14 provides that the moving party will request FMCS to provide a list of arbitrators. The Employer, not the Union, had the duty to move forward and request a list of arbitrators once the Union invoked arbitration.

Even if the instant Arbitrator finds that the Union is the moving party, a prior arbitration decision involving the instant parties should be here applied. In FMCS Case 87-18684, the arbitrator on October 31, 1987 held that considering the circumstances and facts of that case which

are substantially the same here at bar, the delay in requesting a panel of arbitrators was not unreasonable.

Video tapes were the only evidence in the discipline imposed on the Grievant. The Contract requires that the Union be furnished copies of evidence yet the Employer refused to provide copies of the video tapes to the Union.

Of the employees targeted for discipline based on the video tapes, five proceeded to hearing before the Texas Employment Commission (TEC). Since the Employer had refused to provide copies of the tapes, the Union viewed the hearings as an opportunity to secure copies of the evidence. The Employer even refused to provide a copy of the video tape to TEC. The Union then filed an Unfair Labor Practice charge which was later ruled untimely.

After a new Director was appointed in

March 1987 settlement negotiations were undertaken. When these broke down the parties jointly requested a panel of arbitrators for what became FMCS case 87-18684. After the decision in that case the parties renewed settlement negotiations. These too broke down and the parties then jointly requested panels of arbitrators for all remaining cases.

In October 1987 an arbitrator had decided that the delay in requesting panels was reasonable.

Clearly, the brievance is arbitrable.

**CONCLUSIONS**

The San Diego case, although of interest, is not applicable here. It was a local case. Article 14 Section 2G expresly states that awards have only local application unless the grievance is at a national level.

The Union avers that any issue of timeliness must be raised not later than

Step 3 of the Grievance Procedure and cites Article 13 Section 4. Such a claim can not be raised until the Union invokes arbitration. It also can not be raised until the Employer is reasonably sure the matter will go to arbitration. It is not unusual for Unions to state that arbitration will be invoked in an attempt to convince the Employer that it should propose a settlement. The reasonable time to raise the matter is after a panel of arbitrators has been provided. It is a general tenet in arbitration that the authority of the arbitrator may be raised at any time. I do not find that the Employer forfeited its right to raise the arbitrability issue.

The Union claims that since the Employer has the burden of proof in discipline cases it is the moving party and thus is the party to request panels of arbitrators. It has long been held in

arbitration that the Employer does bear the burden of proof in discipline cases. I will not go in to a long polemic here on what is meant by the moving party. For the Union position to prevail the Employer would be required to ask for a panel of arbitrators each time a grievance was filed for it has no way of knowing whether a grievance will be dropped or not by the Union. It does not know whether its response to a grievance will be accpeted or not by the Union. Management acts and Unions react. Unions react to management actions by either accepting that action or by filing a grievance. Managements acts by responding to the grievance. Unions react by accepting mangement responses or by pursuing arbitration. Here it is clear that untimately the Union reacted to the Mangement response by invoking arbitration. The duty to request lists of arbitrators is thus that of the Union. But

the Union responsibility does not end by simply informing Management that it intends to proceed to arbitration. The Union must take some other specific action. That other action is by requesting a list of arbitrators. Here the Union did not do so for some 17 months.

The Union claims that the arbitrator's award in FMCS case 87-18684 disposes of the timeliness issue. This Arbitrator does not agree. The Award in 87-18684 is not binding upon this Arbitrator. Further, the hearing in 87-18684 was held in October 1987. That arbitrator held that the time between the Union informing the Employer of its intent to take the matter to arbitration on July 25, 1986 and the request for a panel of arbitrators on May 7, 1987 was not excessive. That period of time was nine months and 13 days. In the matter here before the Arbitrator the Union advised the Employer that it invoked

arbitration also on July 25, 1986, however the request for a panel of arbitrators was not submitted until December 21, 1987. That is a period of 17 months or almost twise the period of time in case 87-18684.

The Union claims there were mitigating circumstances why it could not earlier ask for a panel. There was nothing to prevent asking for a panel, selecting an arbitrator and then delaying the actual arbitration hearing.

The Union claims that it could not obtain copies of the evidence (the video tape). The convincing testimony is that the Union had access to sufficient evidence for it to prepare a defense. In fact, on July 11, 1986 the Grievant prepred a response to his proposed removal based on the contents of a video tape. Too, the quality of the tape may have been less than perfect but it was clear enough for a response to be prepared.

The Union also states tht it waited until TEC hearings in order to obtain a copy of the tape. A copy was not absolutely necessary for it to prepare its case. It did have access at reasonable times to view the tapes. The Grievant did not have a TEC hearing.

Grievances are frequently settled prior to arbitration. In fact many are settled even after an arbitrator has been selected. Some are settled during arbitration hearings. Just because an offer of settlement is made does not preclude the requesting of lists of abritrators. The convincing testimony and evidence is that no offer of settlement was made between July 1986 and June 1987. Even had there been that would not have precluded the requesting of a panel of arbitrators.

There comes a time when Management can reasonably believe that a grievance has been dropped or abandoned. The hold

otherwise would mean that Management might have grievances pending for years. This arbitrator will not, at this time, hold that after some specific period of time a grievance is abandoned. He will state that when a grievance has been inactively pursued for a period of 10 or 11 months without any action at all Management can reasonably assume the grievance has been abandoned. I so find here.

The Contract provides that prompt settlement of grievances is the goal of the parties. The Agreement provides strict time limits for each step in the grievance procedure except for requesting panels of arbitrtors. To specify the time limits at the other steps it may logically be concluded that some time limit exists for requesting lists of arbitrtors. Again, I will not state what that time limit is but in the situation here before the Arbitrator that period of time has been exceeded.

In view of the above I hold that the matter is not arbitrable in that it was not timely pursued.

**ISSUES 2 and 3. The Merits.**

Since I found the matter to be not arbitrable no discussion or conclusions on the merits will be made.

**ATTORNEY FEES AND COSTS.**

The Union asks that the Grievant, AFGE and Local 1822 be reimbursed for all attorney's fees and costs incurred by them in the prosecution of the grievance. That request is denied.

Fort Worth, Texas
May 25, 1988

/s/ Donald P. Goodman
Donald P. Goodman
Arbitrator

IN THE MATTER OF THE ARBITRATION BETWEEN

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| VETERANS ADMINISTRATION<br>MEDICAL CENTER<br>WACO, tEXAS | ) | |
| and | ) | No. 88-06824<br>(Larry Riley) |
| AMERICAN FEDERATION OF<br>GOVERNMENT EMPLOYEES<br>LOCAL 1822 | ) | |

AWARD

Larry D. Riley was terminated from his employment at the Veterans Administration Medical Center in Waco, Texas, June 17, 1986.

The Union issued notice to invoke arbitration July 9, 1986.

An arbitration panel was requested by the Union December 21, 1987.

The request for the panel was not made by the Union until seventeen and one-half months after it had invoked arbitration.

It is agreed tht the Master Agreement does not provide a specific number of days

in which to request an arbitration panel after invoking arbitration.

Article 13 of the Master Agreement recites that the parties have agreed to a procedure "for prompt and equitable settlement of grievances".

Article 14, Section Two provides in part: "On or after the date of the Notice to Invoke Arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of 7 impartial arbitrtors to act as an arbitrator."

The Agency asserts that the grievance filed herein is not arbitrable because of the seventeen and one-half month delay in requesting a list of arbitrators. It is urged that this delay violates the promptness standard established by the contract.

Several employees were removed during May, June and July 1986. Some of the

grievances which resulted from the dismissals have heretofore been arbitrated.

The Union cites three cases in opposition to the issue of arbitrability. It obviously would be the most expeditious resolution of this question to simply say, "me too".

However, the issue that has been raised deserved more than a carbon copy approach.

The first decision was entered October 31, 1987 by Arbitrator Edmund W. Schedler, Jr. in case number 87-18684 involving the grievant Jeanie Anderson. The issue in that case was determined on the basis of the doctrine of laches. The Arbitrator said, "In my opinion, the rights of the Employer were not prejudiced by the delay" (nine months, thirteen days).

The Anderson case did not confront the simple issue of whether the parties had contracted for a less than indefinite period of time in which the moving party

will request the panel of arbitrators.

The second case is even more interesting. On May 2, 1988, Arbitrator Joe D. Woodward issued an opinion in case number 88-06827 involving the grievant Melvin L. Gayle. When he examined the length of time between the Notice of Arbitration and the Request for a Panel of Arbitrators, he found, "17 months is entirely too long". He then proceeded to rectify this wrong by limiting the back pay award to the Grievant to 10 months. His award seemed to indicated that he felt bound by the 9 plus month finding in the Anderson case.

The Gayle case did not address the question of a procedureal violation in regard to the question of arbitrability.

Then Arbitrator Don J. Harr issued an opinion in the case of Earnest B. Cashaw, number 88-06610, dated May 16, 1985, which probably was intended to be 1988.

This case found that the doctrine of laches was not applicable where there is a reasonable excuse for delay. Harr sanctioned a delay of 18 months. This opinion was issued 14 days after the Woodward opinion which said "17 months is entirely too long".

The parties have entered into an agreement providing "for prompt and equitable settlement of grievances". They have also agreed that "on or after the date of the Notice to Invoke Arbitration, the moving party will request . . ."

In this case the Union offers a number of excuses for delaying the request for a panel of arbitrators. However, at no time did the Union seek an agreement with the Agency to toll the time for requesting a panel or suggest any orderly agreement to process the various claims.

The Union simply delayed seeking the panel and it did so at its peril.

There is no reason that the purely ministerial act of requesting a panel of arbitrators should not be performed within 30 days of the giving of notice of arbitration. However, until the parties clarify this section of the agreement and make the requirement both certain and mandatory it will continue to be reviewed in retrospect on a case by case basis at the whim and caprice of the individual arbitrator.

It is not unfair to suggest that some of the arbitrators cited herein looked at the merits of the case and then found themselves reluctant to dismiss the grievance on the procedureal issue. That is how bad law is formulated. The better practice is to settle with finality the procedureal issue prior to allowing any evidence concerning the merits of the case. When an arbitrator writes that he took "both the issue of arbitrability and

the grievance on its merits, under advisement", he is merely inviting the opportunity to allow the evidence of the one to influence hs decision on the other.

The First Lady of the Cinema, Katherine Hepburn, is often quoted as saying "offer no excuses and accept none, you are either on time or you are late". Her standards would be too rigid for those who judge the gravity of an infraction by whether it causes "prejudice" or is otherwise a "reasonable excuse".

Both parties are entitled to a prompt resolution of their dispute. When the moving party delays the process, it violates the specific negotiated purpose as reflected in the Master Agreement.

It is held that the grievance of Larry Riley is not arbitrable because of the failure of the Union to promptly process the same.

The grievance is dismissed at Oklahoma

City, Oklahoma, this 31st day of May, 1988.

/s/ Don E. Hamilton
DON E. HAMILTON
Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN

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| THE VETERANS ADMINISTRATION MEDICAL CENTER - WACO, TEXAS | * | Re: Federal Mediation & Conciliation Service File No. 87-18684 |
| and the | * | |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES and its LOCAL UNION 1822 | * | Jeanie Anderson - Removal |

The Veterans Administration, hereinafter referred to as "the V.A." or "the Employer," has a psychiatric hospital in Waco, Texas. The Employer recognizes the American Federation of Government Employees and its Local Union 1822, hereinafter referred to as "the Union," as the sole and exclusive representative for the appropriate employees at the hospital. The Employer and the Union have joined in a 3 year labor agreement, hereinafter referred to as "the Agreement," with an effective date of August 13, 1982.

Article 13 of the Agreement provides

for a 4 step GRIEVANCE PROCEDURE for the Union and/or an employee to resolve grievances with the employer over the interpretation of application of the Agreement. If the grievances remain unresolved by the end of Step 3, the Union or management may refer the grievance to arbitration before an arbitrator selected from a panel furnished by the Federal Mediation and Conciliation Service. The undersigned was selected to be the arbitrator for a grievance filed by Mary Jo Joska for Nurse Assistant Jeanie Anderson, the Grievant.

A hearing on the matter was held at the above written time and place. The Union and the Employer attended the arbitration. The parties agreed that this grievance was procedurally correct, except the Employer maintained the grievance should be dismissed on the basis of laches due to the Grievant's unreasonable delay in pursuing

her grievance to arbitration. All witnesses were sworn or affirmed, both parties received the privilege of cross examination, and each party made a closing argument at the conclusion of the hearing. The events leading up to this controversy were not in dispute and I will relate the events as I believe the events occurred.

Preliminary Background Discussion

The Grievant was a Nurse Assistant in Ward 11B at the V.A. hospital. The ward consisted of a large (23 feet by 35 feet) "day room," a porch at the far end of the day room, and patient restroom facilities. Ward 11B was a "closed ward" in that the patients in Ward 11B had strong anti-social behavior, and these patients were confined to Ward 11B. The duty of a Nurse Assistant is to monitor all patient activity so as to prevent any patient from anti-social behavior with another patient.

The Employer has a published policy

concerning the nature of "patient abuse" (Management Exhibit 2). The policy stated:

a. Mistreatment or Abuse of Patients:

(1) It is a fundamental and strictly enforced policy of the VA and of this Medical Center that no patient is to be mistreated or abused in any way, physically, verbally, or mentally. In any case of suspected or alleged mistreatment or abuse, a prompt inquiry will be made to determine the facts, and where indicated, approximate corrective action will be taken immediately.

(2) The initial determination of abuse or reasonable evidence of mistreatment or abuse, must, of necessity, rest in the sound judgment and discretion of the employee(s) witnessing or having knowledge of the incident. If any doubt exists as to whether a patient was mistreated or abused, the facts must be reported for a decision at a higher level of supervision.

(3) Any employee who witnesses or otherwise has knowledge of mistreatment or abuse of a patient, and who does not report such information to his/her supervisor, is subject to disciplinary action.

(4) The penalty for abuse or mistreatment of a patient is removal. A lesser penalty may be imposed only when the abuse or mistreatment is considered to be of a minor nature and is not a repeated offense, or where there are mitigating or extenuating circumstances.

(5) Patient abuse and/or mistreatment not only includes phsysical acts but also acts such as teasing a patient; speaking harshly or rudely; visible irritation toward a patient; laughing at or ridiculing a patient; scolding; indifference; neglect; speaking or gesturing obscenely; and similar acts.

(6) Supervisors will inform new employees of these policies upon entrance on duty and give constant attention to keeping their employees informed on this matter and take all possible steps to prevent abuse or mistreatment of patients.

***1

Sometime during the winter of 1986, management installed a video recorder behind the television set in the day room. The video recorder provided a time lapse tape record of activity in the day room. Chief of Nursing Services Mary Jane Haynie reviewed the tapes. After reviewing the tapes, Haynie decided that the Grievant, as well as other employees, was involved in patient abuse. In a Proposed Removal

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1. The triple asterisk (***) denotes that language immaterial to this grievance has been ommitted.

letter dated May 14, 1986, the Employer alleged:

> 1. This is to notify you that it is proposed to remove you from your position of Psychiatric Nursing Assistant, GS-0621-5, Nursing Service, VA Medical Center, Waco, Texas, for the following reasons:
>
> a. On March 7, 1986, at approximately 9:42 a.m., in Room #223 of Building 11-3, you witnessed an incident of patient abuse. While you were sitting at the desk in that room, you watched Nursing Assistant Ted Basley grab patient Jeff Wilson by the arm, pull him from a chair, and shove him across the room. Nursing Service and station policies and VA Regulations require you to report instances of patient abuse. Your failure to report this incident is a violation of VA Regulation Title 38 CFR 0.735-21(0).
>
> b. On March 21, 1986, at approximately 2:51 p.m., in Room #223 of Building 11-B, you witnessed an incident of patient abuse. While you were sitting at the desk, Nursing Assistant Ted Basley came up behind patient John Torres, grabbed him by the arm, and pushed him across the room. That constitutes patient abuse, and your failure to report this incident is a violation of VA Regulation Title 38 CFR 0.735-21(0).

c. On March 29, 1986, at approximately 12:42 p.m., in Room #223 of Building 11-B, you witnessed an incident of patient abuse. While sitting at the desk you watched as Nursing Assistant Ted Basley chased after James Hood while threatening to hit him with a towel. Your failure to report this incident of patient abuse is a violation of VA Regulation Title 38 CFR 0.735-21(0).

d. On March 29, 1986, at approximately 1:26 p.m., in Room #223 of Building 11-B, you were inattentive to duty. You sat down in a chair in front of the television set and propped your feet up on another chair. You remained watching television until approximately 3:42 p.m. Your actions constitute idleness and inattentiveness to duty and are a violation of VA Regulation Title 38 CFR 0.735-21(R).

The Grievant gave a written response to the Proposed Removal letter. The response was dated June 10, 1986 and contained the following:

> I request that you consider the following in addition to the comments of my representative and me--when we meet with Mr. Baker at 9 AM today--when reaching a decision concerning my proposal:
>
> 1. In regard to "incident 'a'" I saw NONE of this occurrence between

Nursing Assistant Ted Basley and Patient Jeffrey Wilson because my view was blocked by Patients John Torres, Elmer Roberts, and Pleasanton T. Pittman until AFTER the actual interchange had occurred. In addition, all three of the patients near me at the desk are extremely demanding of your complete and undivided attention when THEY choose to interact with you, so, I would have been unlikely to have observed anything except them in this particular situation. I did NOT fail to report this incident because I SAW NOTHING TO REPORT.

2. "Incident 'b'" occurred across the desk from me, but AT THE TIME I only perceived Nursing Assistant Basley grasping Patient Torres by both elbows and turning him 180 degrees toward the smoking day room. I DID NOT perceive any excessive force or speed. On viewing the evidence file tape of this situation I can see where Patient Torres may have turned/been turned a little rapidly, but it was not apparent to me at the time of its actual occurrence and, therefore, I did not report it because I saw nothing to report. I did not fail to report anything because I observed nothing that appeared reportable at that time.

3. In incident 'c'" at 12:42 PM on March 29th my view of the interchange between Nursing Assistant Basley and Patient James Hood was completely blocked by the bodies of both Nursing Assistant Basley (as he progressed across the day room toward the West) and Patient Chris Nagy who (at six (6) feet one and one half (1 1/2) inches and 218 pounds) was leaving

the desk near me and walking also toward the West (and the smoking day room). Even after viewing the evidence file tape, however, I'm not sure what (if anything) actually was happening between Nursing Assistant Basley and Patient Hood. BUT, I was unable to see anything on that date that was reportable; therefore, I did not fail to report anything because I saw nothing that suggested a need to be reported.

4. In "incident 'd'" I was neither inattentive to duty nor willfully idle during the period of time cited. I instead had placed myself on the North wall of the 11-B South day room (non-smoking) in a position to best observe both the patients in the area and those coming and going. Two facts demand attention here. First, one can be attentive, watchful, and observant of his/her patients while seated; and, second, on Saturdays, Sundays, and Holidays all patients have the option--and many of ours exercise it--of bedrest from 1PM to 3 PM. For the records, I was seated with my feet propped up on that particular day for personal reasons, BUT, that does not negate that fact that I was continuously watchful/ observant of all of the patients in the area. Please note, also, that I was seated in the direction of the Southeast corner of the day room and the television is located in the Northwest corner; therefore, I was not seated "in a chair in front of the television set" and was not "watching television." As stated initially, I was neither willfully idle nor inattentive to duty at ANY time during

the entire period cited.

The parties did not agree upon a precise statement of the issue, but from evidence , I have framed the issue to be:

> Did the Employer have just cause to remove Nursing Assistant Jeanie R. Anderson to promote the efficiency of the service? If the answer is "No," what will be the remedy?

The Employer's Position

The Employer pointed out that the union served notice that the Union intended to take this grievance to arbitration on July 25, 1986 and the Union waited 9 months and 13 days until May 7, 1987 before sending the joint request to the Federal Mediation and Conciliation Service for a panel of arbitrators. The Employer argued that the doctrine of laches should be applied and the grievance denied because of the unreasonable delay in requesting an arbitration panel.

The Employer argued that the delay was to the detriment of management. The

Employer pointed out that Director Irvin D. Noll made the decision on removal and Mr. Noll was not available to testify because he retired on December 31, 1986. Furthermore, Mr. M. E. Baker, the Associate Director who made the initial response to the Grievant, was no longer at the V.A. Medical Hospital in Waco. Mr. Baker became Director of the VA Marlin Medical Center. The Employer argued that the Grievant was not entitled to a change in administrations to reconsider her grievance before going forward with arbitration.

As to the merits of this grievance, the Employer contended the video recorder clearly showed that patient abuse occurred on March 7, 1986, March 21, 1986, and March 29, 1986. The Employer maintained that, on each of those dates, the Grievant witnessed patient abuse, yet she failed to report the abuse to supervision. Furthermore, on March 29, 1986, the tapes showed the

Grievant sat and watched TV from 1:26 p.m. to 3:42 p.m. The failure to report the 3 incidnets of patient abuse and the 2 hours and 16 minutes watching TV was just cause to remove the Grievant to promote the efficiency of the service.

The Union's Position

The Union contended that the Grievant was not lax in moving her grievance to arbitration. The Union pointed out that between April 28, 1986 and August 1986, the Employer issued 18 Notice of Proposed Removal letters from reviewing video tapes. The Union was allowed to view edited copies of the tapes, but copies of the tapes were not furnished to the Union. In the summer and fall of 1986, the injured parties were before the Texas Employment Commission for unemployment claims. The Union pointed out that the Employer refused to furnish a copy of the tapes to the Commission as well as the claimants.

Finally, in October 1986, the Union filed an unfair labor practice charge with the National Labor Relations Board, but the charge was untimely. The Union pointed out that there were 5 Texas Employment Commission hearings and Director Noll and Associate Director Baker were not called as witnesses at the Commission hearings.

Ms. Ruby Powell testified as to behavior characteristics of some of the patients who were shown in the tape. Powell was the Nurse Coordinator for ward 11B. She was a Registered Nurse and she was certified as a Psychiatric Nurse by the American Nursing Society. Powell's testimony disclosed:

(1) Patient J. Wilson was a chronic institutionalized management problem. He urinated in public, he made homosexual advances upon other patients, and he used loud, vulgar, and immature language. He frequently

claimed he was injured by the staff and he exaggerated his behavior to an extreme.

(2) Patient John Torres had been at the hospital for many years. He was usually quiet and sat alone. He liked attention and he was unpredictable because he would punch someone if he did not get attention. Powell pointed out that the proper way to move Torres, if Torres was standing, was to approach him from the right side (to avoid a punch) or the rear and grasp both elbows. Torres was a chronic institutionalized patient.

(3) Patient James Hood was about 60 years old. He had been at the hospital many years and he was a mangement problem - Hood would not do what he was told to do. He had a free spirit, used profane language, and he easily became violent with his hands, feet, and

fists. He was of small stature and he did not like to be touched. It was always best to move Hood by approaching him from behind.

Mrs. Deborah Weaver testified she was in charge of 11B the afternoon of March 29, 1986. She testified that the Grievant had asked for funeral leave that day, but she cancelled the leave because she was not feeling well. Ward 11B needed a minimum of 2 Nurse Assistants on duty at all time. On March 29, 1986, one Nurse Assistant went off at 2:30 p.m. and another went off at 3:30 p.m. At this point, Ward 11B would be down to one Nurse Assistant. The Grievant volunteered to stay even though she was not feeling well. Weaver testified that the Grievant sat in the day room near the TV set. She was seated so that she could watch all patient activity in the day room as well as watch patient activity on the porch. The TV was at the Grievant's right

side, she could watch TV is she wanted to watch it, but she was located in the day room so as to monitor all patient activity.

The Grievant's testimony was substantially the same as her written statement. Her testimony disclosed:

(1) Patient Jeffrey Wilson was unmanageable and unpredictable. He was subject to momentary changes in behavior and sometimes became combative. On March 7, 1986, the ward had a new patient. This patient was sitting quietly to the Grievant's right at about 9:41 a.m. that day. Wilson walked over to the new patient to make a homosexual advance and Basley went to the scene and stood between the new patient and Wilson. Wilson refused to move and Basley moved Wilson away from the new patient. The Grievant did not see that activity because there were patients at the corner of her desk who

blocked her view.

(2) On March 21, 1986, the tape showed patient John Torres walking. His fists were clenched. He was known to suddenly hit people. It appeared that a fight was about to start and Basley turned Torres around to avoid a fight.

(3) At 12:42 p.m. on March 29, 1986, Basley had a large towel. This was not unusual because towels were needed at meal time; but the Grievant did not see any patient abuse because the individuals involved were walking away from her.

(4) The Grievant testified she was not feeling well on Saturday, March 29, 1986. She stayed at work because there was insufficient coverage by Nursing Assistants for the entire day and patients were more comfortable with a familiar nurse in the ward. She sat down at the far end of the ward so that

she could observe activity in the day room and the porch. The TV was on the wall to her right and, as was customary, she occasionally changed the channels when programs with violence or highly emotional programs came on.

Opinion

In this grievance, the Employer maintained there was just cause to remove the Grievant for failing to report patient abuse and for inattention to duty. Furthermore, the Employer maintianed the doctrine of laches should apply because the Grievant delayed 9 months and 13 days before requesting a panel of arbitrators. The Union maintained the Employer did not have just cause to remove the Grievant and the doctrine of laches should not apply because of the large number of removals triggered by the video recordings. After carefully considering all the evidence, I find that there is no merit to the

Employer's claim that the doctrine of laches applied to this grievance and I find that the Employer did not have just cause to remove the Grievant. I will explain my reasons for this finding.

1. The fundamental meaning of "laches" is laxness, negligence, or neglect. Laches occurs when the moving party does nothing to exercise a right or vindicate a wrong. It occurs with a laspse of time, sometimes great, and operates as a prejudice to the adverse party. In determining what constitutes unreasonable delay, I must consider the circumstances that caused the delay and whether or not the rights of the Employer were prejudiced by the delay. Laches will not bar a recovery where there is a reasonable excuse for the delay.

In my opinion, the rights of the Employer were not prejudiced by the

delay. The Employer pointed out that Director Noll had retired and Associate Director Baker had gone to the V.A. Hospital in Marlin. The Employer gave no reason why Mr. Noll was unavailable except to say he retired. I have had retired people testify at arbitrations. Quite frequently, retired people remain in the community and they can be called as witnesses. Mr. Baker changed jobs. He went to a new job amount 20 miles away in Marlin, Texas. I believe Mr. Baker could have been called as a witness if the Employer wanted to call him.

I also note that the Union argued that neither Mr. Noll or Mr. Baker were witnesses at the Texas Employment Commission hearings. Surely, if their testimony would be of little value at a T.E.C. hearing, then more likely it would not be of great value at this

arbitration. The fact that Mr. Baker was nearby, but not called as a witness, persuades me that the Employer suffered no prejudice in presenting the Employer's evidence at this arbitration.

In my opinion, the Union had a valid reason for the delay. Initially, as a result of the video tapes, between 23 and 26 Notice of Removal letters were issued. In the summer and fall of 1986, the disciplined employees took their cases to the Texas Employment Commission. They were unable to get copies of the video tapes and the question of refusing to provide copies was brought before the National Labor Relations Board. Those issues were not resolved until late 1986 or early 1987. In my opinion, the weight of the numerous grievances that had to be pursued as well as the various forums

that had to be attended was good and sufficient reason for the delay of 9 months and 13 days in requesting a panel of arbitrators form the F.M.C.S. The Employer's defense of laches is dismissed.

2. I was furnished an edited copy of the video tapes to review in considering the evidence against the Grievant. The testimony at the arbitration was that the Grievant's failure to report the activities seen on the tapes justified her removal. I reviewed the tapes, using equipment that allowed me to slow the entire action so as to consider each movement of the individuals involved. From this review of the edited tape, I make the following findings:

(a) I find no nonfeasance by the Grievant when she did not report patient abuse on March 7, 1986.

The video camera was located at a corner of the day room and the camera faced diagonally the opposite corner of the day room. The Grievant was seated at a desk at the opposite corner. The camera showed what the camera could see, but it did not show what the Grievant could see.

There were 3 patients at the Grievant's desk. A new patient was seated next to the wall at the Grievant's left. There were 3 patients at the corner of the Grievant's desk and her view of the new patient was blocked. Patient Jeffrey Wilson walked up to the new patient and Basley moved to stand between them. When Wilson refused to leave, Basley turned Wilson around and moved Wilson towards the middle of the

day room. I am persuaded that the 2 or 3 patients at the Grievant's desk were blocking her view of the activity between Basley and Wilson; therefore, I find the Grievant was not guilty of failing to report the activity in question.

The tape of March 21, 1986 showed that Basley turned Patient Torres around. Torres was known for his unpredictable behavior. It appeared that a fight was about to start. Basley quickly turned Torres around so as to avoid a confrontation. Viewing the tapes does not accurately disclose all the activity in the day room. If the viewer does not know the behavioral characteristics of the patient, then a seemingly innocent approach by one patient to another

patient may actually be the prelude to violence. The Nurse Assistants in the ward were supposed to know the behavioral characteristics of each patient so as to prevent any anti-social conduct. Video tapes do not disclose, in advance, the behavior characteristics of the patients.

(c) The 3rd incident occurred at 12:42 p.m. on March 29, 1986. In that incident, the Employer alleged that Nurse Assistant Basley chased Patient James Hood and that Basley popped Hood with a towel. The tape showed the Grievant at her desk and Hood walking away from the desk. Hood was near the middle of the room and another patient as well as Basley were between Hood and the Grievant.

In my opinion, the Grievant could not see the action between Basley and Hood - their backs were towards the Grievant and the Grievant could not see what Basley was doing with his hands. I find that the Grievant was not guilty of failure to report the activity of March 29, 1986.

(d) The 4th allegation was that the Grievant was inattentive to duty on March 29, 1986. I do not agree. She was seated where she could see activity in the day room as well as the porch. She could have easily sat in a location where she had an easier view of the TV. She did not. She put her feet on a chair in front of her. She did not go to sleep and her supervisor, Weaver, came into the day room and spoke with the -

Grievant on at least 2 occasions. On one occasion, Weaver sat and talked with the Grievant. There was not the slightest indication that the Grievant was not monitoring patient activity.

Award

After careful consideration of all the evidence and upon the foregoing findings of fact, I find that the answer to the question at issue is "No, the Employer did not have just cause to remove Nurse Assistant Jeanie Anderson to promote the efficiency of the service." The Employer will immediately offer to:

1. Expunge the Proposed Removal letter and the Decision of Proposed Removal letter from the personnel file of Jeanie Anderson,
2. Re-instate Jeanie Anderson to her former position without

loss of seniority or other benefits of employment, and

3. Make Jeanie Anderson whole for all loss of earnings from the date of her removal until she returns to work.

/s/ Edmund W. Schedler, Jr.
Edmund W. Schedler, Jr.,
Arbitrator
October 31, 1987

IN THE MATTER IN ARBITRATION

BETWEEN

| | | |
|---|---|---|
| VETERANS ADMINISTRATION<br>1400 N. VALLEY MILLS<br>DRIVE<br>WACO, TEXAS 76799 | ) | ARISING OUT OF<br>A GRIEVANCE<br>FILED ON BEHALF<br>OF:<br>MELVIN L. GAYLE |

THE FACTS

The Agency operates a Veterans Hospital in Waco, Texas. It employs approximately 1,500 employees at the facility. The hospital specializes in phsyciatric disorders.

The grievant was a psychiatric nurse's assistant on Ward II B at the Va Hospital at the time of his removal from Federal Service on June 23, 1986. He had been employed by the Veterans Administration for approximately 11 years at the time of his removal. The grievant's overall record of employment with the Agency is generally good, although it is not perfect. He was suspended on one occasion for an infraction

and admonished on another occasion.

Many of the facts in ths case are relatively undisputed. The evidence discloses that, during the early part of 1986, "unobserved and unexplained" patient injuries were occurring on the locked wards of the hospital of which Ward II B was a part. Many of these injuries occurred on Ward II B.

In late 1985, the hospital acquired a surveillance camera for use in the solution of drug thefts at the hospital. In an attempt to solve the mystery of the "unobserved and unexplained" injuries occurring on the locked wards, the Director of the hospital ordered a surveillance camera installed in an inconspicuous place on Ward IIb. Although the Director requested his General Counsel's opinion as to the legality of the use of the surveillance, the Director did not notify the Union of the installation or use of

the surveillance camera.

The surveillance camera was of the times sequence photograph type which takes individual still photographs of a wide area on an approximate sequence of one photograph every two seconds. The time elapsed and the date is recorded on each frame. The camera stayed in place over a period of several weeks and the video tapes were reviewed by Security Officers on a daily basis.

As a result of alleged abuses by other employees, recorded on the video tapes, the grievant was charged with several incidences of failure to report abuse of patients.

The specific incidences with which the grievant is charged are failure to report abuse of patients alleged to have occurred on March 7, 1986 at 7:07 a.m.; March 7, 1986 at 7:11 a.m.; March 12, 1986 at 7:48 a.m.; March 26, 1986 at 7:12 a.m.; March

29, 1986 at 7:19 a.m.; and April 7, 1986 at 7:31 a.m. The allegations pertaining to March 12, 1986 at approximately 7:50 a.m. and March 26, 1986 at approximately 7:12 a.m. were not sustained in the lower steps of the grievance procedure, however, the remaining allegations were sustained in the lower steps of the grievance procedure and as a result, the grievant was removed from Federal Service on the 23rd day of June, 1986.

The use of the surveillance camera also resulted in the discipline or discharge of numerous other employees for reasons related to and similar to those which resulted in the grievant's removal from Federal Service. The Union apparently has represented or is representing all of the disciplined or dismissed employees. The progress has been very slow in the disposing of the back-log of representation created by the surveillance camera and no

panel of arbitrators was requested by the Union in the instant case until December 21, 1987, seventeen months after it notified the Agency of its intent to arbitrate. The Agency, at the time the Union requested a panel of arbitrators from the Federal Mediation and Conciliation Service, advised the Union that it intended to raise the question of timeliness due to the 17 month lapse in the Union's request for a panel of arbitrators.

The matter is properly before the arbitrators for resolution of the dispute between the parties.

## THE ISSUE

THE ISSUE IS FOUND TO BE: IS THE MATTER ARBITRABLE AND, IF SO, DID THE VETERANS ADMINISTRATION REMOVE THE GRIEVANT FROM FEDERAL SERVICE FOR SUCH CAUSE AS WILL PROMOTE THE EFFICIENCY OF THE SERVICE.

The Agency has raised the question of arbitrability in this matter and contends that the matter is not arbitrable due to

the Union's "unjustified and unreasonable" delay of 17 months between the Notice of Arbitration on July 7, 1986, and the Union's request for a panel of arbitrators from the Federal Mediation and Conciliation Service on December 21, 1987.

The question of arbitrability is a threshold question which must be resolved prior to proceeding to a resolution of the case on the merits. The agency contends that the agreement between the parties requires the Union, as the moving party, to institute a request for a panel of arbitrators within a reasonable time and that a delay of 17 months is unreasonable. The Agency contends that there were no negotiations on the matter between the dates of July 7, 1986 and April or May of 1987. The Agency further argues that the delay of 17 months has changed the status of the parties to the extent that many of the Agency's witnesses have retired,

transferred or their memories have faded to the extent that it is very difficult for the Agency to carry the necessary burden of proof to defend its original actions in removing the grievant from Federal Service.

On the other hand, the Union takes the position that the master agreement between the parties requires the Agency to assert any claim of non-grievability or non-arbitrability no later than the Step Three Decision in the grievance procedure and that the Agency did not raise the question at Step Three and further that the Union did not have the burden to require the list of arbitrators under the master agreement because it was not the moving party; that the moving party is the party having the burden or proof in the arbitration matter on the merits of the case; that inasmuch as removal in this case was disciplinary discharge, the burden of falls on the Agency and that therefore, the

Agency is the moving party. The Union further contends that the practice between the parties is that in the past the parties have submitted joint requests for lists of arbitrators and neither party in the past has unilateraly requested a panel. Also, the Union agrees that the request for a list of arbitrators should be made "within a reasonable amount of time" but contends that the time of 17 months in this case, due to all of the circumstances surrounging the case, was not unreasonable; that during the 17 months, another case was arbitrated and the facts were exactly the same as here, and that after a determination was made by the arbitrator in that case representatives of the Union and Agency entered into the settlement negotiations for other employees who were removed under similar circumstances arising out of the use of the surveillance camera during the same period of time. The Union also urges

that the prior arbitration case should be a binding precedent in the case at hand.

With respect to the question on arbitrability, the pertinent part of the contract is as follows:

ARTICLE 14
ARBITRATION
SECTION ONE

> Only the union or management may refer any grievance that remains unresolved after the final step of procedures of Article 13 to arbitration.
>
> A notice to invoke arbitration shall be in writing to the opposite party. Such notice shall be made within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure.

SECTION TWO
CONVENTIONAL ARBITRATION PROCEDURE

> A. On or after the date of the Notice To Invoke Arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of 7 impartial arbitrators to act as an arbitrator. The party shall meet within 10 calendar days after receipt of such list to select an arbitrator---(Underscoring supplied)

It is clear in this case that the Union is the "moving party" and as the "moving party" it was the Union's duty to request the list of arbitrators from the Federal Mediation and Conciliation Service. However, in this particular case, the facts and circumstances indicate that there was some justification for the delay in making the request. As a result of the use of the surveillance camera, the Agency issued almost 20 "Notice of Proposed Removal" letters after reviewing the video tapes. This process began in April 1986, and continued through August 1986. In the ensuing time, numerous hearings were held befor the Texas Employment Commission for unemployment claimsof the removed employees. During this same period the Union unsuccessfully requested copies of the videotapes which they were allowed to view but the Union was not allowed to have copies. There were also overtures made by

the Union to settle the cases without resorting to arbitration. Finally, the first case did reach arbitration on October 1, 1987, and an award was made on October 31, 1987. It is obvious that the Union was very busy in its efforts to furnish fair representation to its members during this protracted period of time.

The Agency took the position at this hearing that is was prejudiced by the long delay in that the director of the VA Hospital in Waco has retired in the interim and several witnesses have been transferred. However, the former director in question did testify at the hearing and at least one former employee who had been transferred also appeared and testified. The Agency made no proffer of any crucial evidence at the hearing which was unavailable to it as a result of the delay. Neither did the Agency request that any subpoenas be issued by the arbitrator.

The Agency relied heavily in its post hearing brief on the case of the Veterans Administration, San Diego Regional Office and AFGE, Local 490, FMCS No. 87-23622 dated November 4, 1987) (Wilcox, Arbitrator), wherein the arbitrator held that a Union had the responsibility to keep a grievance alive by promptly requesting a panel of arbitrators and when it did not do so for over 8 months, the delay was unreasonable. The facts of that case are clearly distinguishable from the case at hand. The arbitrator of that case found that there was no reason for the Union to delay its request for a panel for 8 months. Here the work load of the Union, the intervening hearings before the Texas Employment Commission and the other peculiar circumstances surrounding this case distinguishes this case form the san Diego Case to some degree. As stated above, the Union has some justification for

the long delay and while the arbitrator in a companion case held that a nine month delay was not unreasonable, 17 months is entirely too long. The Union must be held to some degree of blame. The degree of blame is not found to be so great, however, that the grievant should be denied this contractual remedy. A complete denial of a hearing in the matter would reach a result which is unacceptable in this case. The Union, on the other hand should bear some of the responsibility for the long delay as is noted below.

The matter is arbitrable.

* * *

Under all of the facts and circumstances of this case, the Agency simply did not carry its burden of proving that abuse of patients did, in fact, occur on the occasionns alleged, much less that the grievant failed to report them. If no abuse happened, then the grievant certainly

could not have been guilty of failure to report patient abuse.

III.
ATTORNEY'S FEES AND BACK PAY

* * *

The back pay due to this grievant is excessive partly due to the long delay in applying for a panel of arbitrators. Therefore, the back pay will be limited to a period of ten months.

AWARD

The grievance is sustained and the Agency is ordered to immediately reinstate the grievant to his job as a psychiatric nursing assistant and to expunge the grievant's removal letter and all allied papers pertaining to this matter from the personnel file of the grievant; that the grievant should be reinstated without loss of seniority and other benefits and the grievant should be paid for ten months loss of earnings beginning on the date of his

removal and ending ten months thereafter. The back pay award shall bear interest at the amount of 8 per cent from the date of accrual to the date paid.

In the event of any disagreement in the interpretation of this award, the arbitrator retains jurisdiction for the purpose of clarifying the same.

/s/ Joe D. Woodward
Joe D. Woodward
Arbitrator

DATED this 2nd day of May, 1988.

IN THE MATTER OF
ARBITRATION BETWEEN

THE VETERANS ADMINISTRATION
MEDICAL CENTER, WACO, TEXAS

NO. 88-06610
Ernest B.
Cashaw

AND

THE AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES and its
LOCAL UNION 1822

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Pursuant to the Master Agreement between the Parties, effective August 13, 1982, Article 14, the undersigned was selected as arbitrator to hear and render a decision in the above referenced grievance from a panel of arbitrators provided by the Federal Mediation and Conciliation Service.

* * *

The parties agreed that the grievance was procedurally correct. Prior to the hearing, the Agency raised a threshold issue of timeliness. The Agency contends that the grievance should be dismissed, on the basis of laches, due to the Grievant's

unreasonable delay in pursuing his grievance to arbitration. Both parties submitted thorough pre-hearing briefs on the issue of arbitrability.

* * *

OPINION:

ARBITRABILITY -

In the award covering the Jeanie Anderson grievance (FMCS File No 87-18684) Arbitrator Edmund W. Schedler, Jr. stated:

> "In my opinion, the Union had a valid reason for the delay. Initially, as a result of the video tapes, between 23 and 26 Notice of Removal letters were issued. In the summer and fall of 1986, the disciplined employees took their cases to the Texas Employment Commission. They were unable to get copies of the video tapes and the question of refusing to provide copies was brought before the Federal Labor Relations Board. (sic) those issues were not reolved until late 1986 or early 1987. In my opinion, the weight of the numerous grievances that had to be pursued as well as the various forums that had to be attended was good and sufficient reason for the delay of 9 months and 13 days in requesting a panel of arbitrators from the F.M.C.S. The employer's defense of laches is dismissed."

The Agency attempts to support their position that the grievance should be dismissed on the basis of laches, for the reason that Director Noll, Chief of Nursing Service Haynie and others had either retired or moved to other positions within the Veterans Administration hospital system. Mr. Noll was evidently unavailable to testify at the Jeanie Anderson hearing. He did, however, testify in the instant case. Mr. Noll testified that he felt it was his "duty" to appear, since he was the one who made the ultimate decision to remove the Grievant. It appears that none of the persons whose testimony was essential to the Agency's case were not truly unavailable.

An element of the doctrine of laches is that the defendant's alleged change of position for the worse must have been induced by or resulted from the conduct, misrepresentation, or silence of the

plaintiff. Laches will not bar a recovery where there is a reasonable excuse for the delay.

The Agency relies on an arbitration decision rendered in a local grievance at the VA regional office in San Diego, California, in November of 1987. That decision held that a grievant who delayed eight months in requesting a panel of aribtrators violated the Master Agreement. The decision of an arbitrator in California does not have application to the instant case. Article 14, Section 2G. provides:

> "An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level under the procedure set forth below."

The Union also argues that the Agency was the "moving party" and should have themselves requested an arbitration panel. Without reaching a decision concerning this argument the arbitrator would point out that the Agency could have requested a

panel if they so desired.

It is the opinion of the arbitrator that the Union has established a valid reason for the delay in requesting an arbitration panel. The Agency's defense of laches is dismissed.

* * *

After a careful consideration of the facts and the evidence presented, the arbitrator finds that the Agency did not have good cause to remove Nursing Assistant Earnest B. Cashaw to promote the efficiency of the service.

/s/ Don J. Harr

Dated at Oklahoma City, Oklahoma this 16th day of May, 1988.

**RELEVANT EXCERPTS FROM**
**MASTER AGREEMENT**
**BETWEEN THE**
**VETERANS ADMINISTRATION**
**AND THE**
**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES**
(August, 1982)

ARTICLE 13

GRIEVANCE PROCEDURE

Section 1 - The purpose of this Article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for reolving grievances except as provided in Sections 2 and 3.

* * *

Section 4 - If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Agency must assert any claim of non-grievability or non-arbitrability no later than the Step-3 decision.

* * *

Step 3. If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director, or designee, in writing, within 7 calendar days of receipt of the decision of Step 2. The Director or designee, will meet with the aggrieved employee and his/her representative with 7 calendar days to discuss the grievance. The Director or designee will render a decision, in writing, to the aggrieved party and the Union within 10 calendar days after the meeting.

Step 4. If the grievance is not satisfactorily resolved in Step 3, the grievance may be referred to arbitration as provided in Article 14.

* * *

ARTICLE 14

ARBITRATION

Section 1 - Only the Union or management may refer any grievance that remains unresolved after the final step under the procedures of Article 13 to arbitration. A notice to invoke arbitration shall be in writing to the opposite party. Such notice shall be made within 30 calendar days after receipt of the written decision rendered in the final step fo the grievance process.

Section 2 - Conventional Arbitration Procedure

A. On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator. The parties shall meet within ten (10) calendar days after receipt of such list to select an arbitrator (this may be done by telephone for national level

grievances). If they cannot mutually agree on one of the listed arbitrators, then management and the Union will alternately strike one arbitrator's name from the list of seven (7) and will then repeat this procedure. The remaining person shall be the duly selected arbitrator. If either party refuses to participate in the selection process, the other party will make a selection of an arbitrator from the list.

B. The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator...

* * *

G. An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level under procedures set forth below...

* * *

Section 3 - Expedited Arbitration

Conditions for Expedited Arbitration: notwithstanding the regular arbitration procedures of the Agreement, the following expedited arbitration procedure is hereby adopted to provide prompt and efficient handing of specified grievances:

* * *

B. Procedures and Time Limits

1. Upon receipt of an employer decision at the last step of the grievance procedure, the Union president involed may notify the Employer, in writing, of an intent to appeal to an arbitrator under the provisions of this program. The notice of intent to appeal must be within twenty (20) workdays of receipt of the Employer's decision.

2. Within twenty (20) workdays of the date of the notice of intent to appeal, the Union and Employer may confer and the

Union may telephone the arbitrator who--pursuant to the rotation system described above--is scheduled for the next hearing. A written confirmation notice shall be sent to the arbitrator and a copy shall be furnished to the Employer involved.

3. The arbitration hearing shall take place on the date(s) arranged by the Union, Employer, and arbitrator, but in no case shall it take place later than ten (10) workdays after the phone call from the Union is received by the arbitrator.

(3)

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-68

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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WILBURN GONCE, ET AL., PETITIONERS

*v.*

VETERANS ADMINISTRATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether, in arbitrating certain disputes under a collective bargaining agreement between a union and the Veterans Administration, the arbitrators were required to give issue-preclusive effect to prior arbitration awards.

2. Whether the arbitrators erred in holding that grievances were not arbitrable because the union, in waiting over 17 months to request a list of arbitrators, unreasonably delayed resolution of the grievances in violation of the governing collective bargaining agreement.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20)[1] is reported at 872 F.2d 995. The opinions of the arbitrators (Pet. App. 21-37 (Gonce case); Pet. App. 38-45 (Riley case)) are unreported.

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[1] Judge Nichols' dissenting opinion, which is omitted from petitioners' appendix, is reproduced as an appendix to this brief. App., *infra*, 1a-2a.

## JURISDICTION

The judgment of the court of appeals was entered on April 13, 1989. The petition for a writ of certiorari was filed on July 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners Gonce and Riley were employed as members of the nursing staff of a locked psychiatric ward at the Veterans Administration Medical Center in Waco, Texas. Pet. App. 2. Between April and August 1986, the Veterans Administration (VA) issued letters of proposed removal to 19 employees, including Gonce and Riley, on charges that arose from alleged patient abuse documented by hidden videocameras. *Ibid.*

The VA terminated the employment of petitioner Gonce on June 12, 1986, and that of petitioner Riley on June 17, 1986. Pet. App. 5. Both employees, through their union, the American Federation of Government Employees, Local 1822 (the Union), challenged the termination through the grievance-arbitration procedure established pursuant to the collective bargaining agreement in effect between the VA and the Union. Pet. App. 2-3. On July 9, 1986, the union invoked arbitration on behalf of petitioner Riley; on July 25, 1986, it invoked arbitration on behalf of petitioner Gonce. However, the Union did not ask for a list of possible arbitrators, as required by the collective bargaining agreement,[2] until it did

[2] The collective bargaining agreement requires that: "On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator. The parties shall meet within ten (10)

so for both claimants on December 21, 1987, more than 17 months after it had invoked the arbitration procedures. Pet. App. 5.

The grievances were separately entertained by two arbitrators. The Union offered several mitigating reasons for the delay in requesting a list of arbitrators, including its representation of other affected employees before the Texas Employment Commission (Pet. App. 3, 23); a dispute over the quality of videotaped evidence that led the Union to file an unfair labor practice complaint with the Federal Labor Relations Authority (later dismissed as untimely filed) (Pet. App. 3, 23-24); and settlement negotiations held between the Union and the VA in the summer of 1987 (Pet. App. 3, 23). The arbitrators issued independent opinions rejecting the Union's excuses, and determining that the grievances were not arbitrable because the Union's failure to pursue them in timely fashion violated the collective bargaining agreement. Pet. App. 36 (Gonce), 44 (Riley). In reaching this conclusion, both arbitrators declined to follow prior arbitral decisions under the same agreement.

2. On petitioners' appeal of the arbitrators' decisions, the Federal Circuit affirmed. The court ruled that under this Court's decisions, "the preclusive effect or [*sic*] prior arbitration awards is for individual resolution, absent a provision in the governing contract" providing that earlier awards would bind subsequent arbitrators. Pet. App. 8. The court found that there was no such requirement in the collective bargaining agreement at issue in these cases. Pet. App. 8-9. In accordance with *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the United Rubber*

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calendar days after receipt of such list to select an arbitrator * * *." Pet. App. 96.

*Workers*, 461 U.S. 757, 764 (1983), the court limited its review to the question whether the arbitrators' conclusions were inconsonant with public policy or whether they instead "dr[ew] [their] essence" from the collective bargaining agreement. Pet. App. 12-13. The court noted that the collective bargaining agreement in fact allowed either party to request that multiple grievances over the same issue be handled individually (Pet. App. 13-14), and concluded that by this procedure the agreements contemplated a lack of uniformity among awards and accepted it as unobjectionable. *Ibid.*

The court found issue preclusion inappropriate in any event because although the *Gonce* and *Riley* cases were related to previous cases, the actions taken against the VA employees were based on separate instances of alleged misconduct. Pet. App. 10. The court noted that the absence of transcripts of previous arbitration proceedings left it unable to determine whether different mitigating circumstances might distinguish the cases. Pet. App. 10-11. Consequently, the cases were not marked by the "precise correspondence of facts, circumstances, and timing" that might make issue preclusion appropriate. Pet. App. 15. Finally, the court determined that the arbitrators' decisions were thorough and well reasoned on the merits. Pet. App. 15-18. Thus the court concluded: "We agree with the arbitrators that there comes a time when the employer has a right to know whether a union or employee intends seriously to prosecute a formal grievance, and there is no basis to overturn the conclusion that a seventeen-month delay is a violation of the collective bargaining agreement." Pet. App. 19.

Judge Nichols, dissenting, agreed with the majority that the arbitrators were not bound by any preclusive effect of the previous arbitral decisions, but concluded that the arbitrators had erred in ruling that the collective bargaining agreement imposed on the Union a requirement of a timely request for a list of arbitrators. App., *infra*, 1a-2a.

## ARGUMENT

1. Petitioners principally contend (see Pet. 13-14, 18-19, 26-32) that the arbitrators below were bound by prior arbitral decisions allowing other grievants to secure arbitration of the merits of their grievances despite lengthy delays in requesting lists of arbitrators. However, the court of appeals was correct in holding that, in the absence of a statutory or contractual requirement, the preclusive effect of prior arbitral awards is a matter to be determined in each individual arbitration. And, as the court concluded after review, the arbitrators in these cases were not required to give the previous awards preclusive effect.

a. As an initial matter, nothing in the governing statute requires that a decision in one arbitration control disposition of the same issue in all subsequent arbitrations. The Federal Service Labor-Management Relations statute, 5 U.S.C. 7101 *et seq.*, requires only that collective bargaining agreements between covered agencies and employee unions "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). The statute is silent with respect to the preclusive effect of arbitral decisions and instead leaves that matter to negotiation.

b. Absent a contrary statutory directive, no principle of law requires arbitral decisions to be given preclusive effect in subsequent arbitral proceedings. To the contrary, in such circumstances the preclusive effect of a prior arbitral award depends solely on the terms of the collective bargaining agreement and hence is a matter of contract interpretation to be resolved through arbitration. Thus, in *W.R. Grace & Co.*, 461 U.S. at 764-765 & n.7, the Court held that the question whether one arbitrator must give preclusive effect to the decision of another arbitrator raises an issue of contract interpretation that is itself delegated to the arbitrator for decision. This holding was consistent with prior decisions of the courts of appeals, which, like the decision below, uniformly held that the preclusive effect of an arbitral award is determined with reference to the contract, not general principles of issue preclusion. See, *e.g.*, *Courier-Citizen Co.* v. *Boston Electrotypers Union No. 11*, 702 F.2d 273, 280 (1st Cir. 1983); *Little Six Corp.* v. *United Mine Workers Union, Local No. 8332*, 701 F.2d 26, 29 (4th Cir. 1983); *New Orleans Steamship Ass'n* v. *General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980), aff'd *sub nom. Jacksonville Bulk Terminals, Inc.* v. *Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Riverboat Casino, Inc.* v. *Local Joint Executive Bd.*, 578 F.2d 250, 251 (9th Cir. 1978).[3]

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[3] *Connecticut Light & Power Co.* v. *Local 420, Int'l Brotherhood of Electrical Workers*, 718 F.2d 14 (2d Cir. 1983), cited by petitioners (Pet. 14), is not to the contrary. The court in that case was faced with conflicting arbitral decisions, the first of which had been vacated by the district court. The court recognized that although arbitrators usually follow prior decisions, the principles of stare decisis and res judi-

c. The arbitrators' determination that they were not bound by prior arbitral decisions is a reasonable interpretation of the collective bargaining agreement and was properly upheld by the court of appeals. This Court has emphasized the limited scope of judicial review of arbitral decisions:

> When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," * * * a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

*W.R. Grace & Co.*, 461 U.S. at 764 (quoting *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (brackets in original)).

The arbitral decisions here plainly satisfy this deferential standard of review. The collective bargaining agreement states: "Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1 [of the grievance procedures]." Pet. C.A. App. 26 (Agreement, Art. 13, Sec. 10). As the court of appeals observed (Pet.

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cata do not apply with the same force in arbitration proceedings as they do in judicial proceedings. 718 F.2d at 20. Under the unusual circumstances of the case, in which the second arbitral decision was inconsistent with the first arbitrator's order to the employer to cease and desist, the court went on to uphold the district court's judgment on the ground that the second arbitral decision was the "better reasoned" of the two. 718 F.2d at 21.

App. 13-14), this provision indicates that a lack of uniformity among awards is not unexpected or objectionable.[4]

2. The court of appeals correctly affirmed the arbitrators' determinations that a 17-month delay in requesting a panel of arbitrators is unreasonable and violates the contractual provisions requiring the parties to resolve grievances promptly. As noted above, a reviewing court will not overturn an arbitral determination if the decision draws its essence from the contract and is not otherwise contrary to law or public policy. *W.R. Grace Co.*, 461 U.S. at 764-766. As the court of appeals indicated (Pet. App. 19), the arbitrators' decisions are consistent with contract provisions requiring "prompt and equitable settlement of grievances" (Pet. App. 94) and imposing on the union, as moving party, a duty to request a list of possible arbitrators "[o]n or after the date of the

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[4] Even if arbitrators were obligated to apply principles of issue preclusion, the court of appeals correctly determined that preclusion was not required on the particular facts of this case. This Court has held that a determination made in a prior proceeding is not preclusive in subsequent proceedings unless the litigant against whom preclusion is invoked has had a full and fair opportunity to litigate the issue and unless the issues are in substance the same. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979). Here, the court of appeals found that petitioners had failed to establish that the issues presented in their proceedings were identical to those resolved in the prior arbitral awards. Pet. App. 10-12, 15. Specifically, the court noted that the actions taken against the relevant employees were based on separate instances of misconduct. Pet. App. 10. It also noted that petitioners had failed to carry their burden of establishing that their cases involved the same mitigating circumstances as those that led the arbitrator in a prior case to permit a delay in requesting a list of arbitrators. Pet. App. 11.

notice to invoke arbitration" (Pet. App. 96). In addition, the court correctly reasoned that the arbitral decisions are consistent with federal policy favoring arbitration as a means of securing the expeditious resolution of grievances (Pet. App. 18).[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

STUART E. SCHIFFER
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SANDRA W. SIMON
*Attorney*

SEPTEMBER 1989

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[5] Petitioners also argue (Pet. 22) that the VA could not even raise the issue of the Union's tardiness because the VA itself did not make its "non-arbitrab[ility]" claim in a timely fashion. As the arbitrator in the Gonce case explained (Pet. App. 31), that contention is untenable, since the VA's delay in raising the issue to an arbitrator was *caused* by the Union's delay in requesting the list of arbitrators.

## APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Nos. 88-3328, 88-3329

WILBURN GONCE AND LARRY RILEY, PETITIONERS

*v.*

VETERANS ADMINISTRATION, RESPONDENT

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Apr. 13, 1989

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* * * * *

NICHOLS, Senior Circuit Judge, dissenting.

Respectfully, I dissent. I agree with the court about collateral estoppel, *i.e.*, if the parties had wanted decisions respecting different employees to be consistent, they could have taken steps to cause that to occur. It may be that antecedently they preferred to allow a possibility of inconsistency. They must have known the standard procedure produced a different arbitrator for each discharged employee, despite the close interrelationship of all the cases of the 19 removed employees—a strange way to run a railroad—but so it is.

I think the arbitrators in the Gonce and Riley cases made an over-imaginative use of the collective bargaining agreement. It does not expressly say, nor do I think it reasonably implies, that the union must request the panel of arbitrators without awaiting the outcome of settlement negotiations, or pursuit of other remedies, and within some fixed time. The likely result of a request would have been that the persons to arbitrate Gonce and Riley would have known of their selection, and they might have set their time clock running and gone to work on the cases, though settlement still seemed likely. The union made an uncontradicted showing that it would be unfeasible to try 19 cases or any substantial portion thereof simultaneously.

The union simply led Gonce and Riley into a trap for the unwary, set for them by parties more skilled than the union was in the intricate choreography of collective bargaining. The case once again shows how foolish any lay person is in these United States and this year of grace, 1989, to engage in any transaction, important and novel to him or her, without having a skilled (and expensive) lawyer at his elbow. As to the remedies Gonce and Riley may have against the union for loss caused by its obvious carelessness, *cf. Karahalios v. NFFE*, —— U.S. ——, 109 S.Ct. 1282, 108 L.Ed.2d 539 (1989).

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